

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:21.02.2020

DELIVERED ON: 02.06.2020

CORAM:

THE HON'BLE MR.JUSTICE **V.PARTHIBAN**

S.A.NO.420 OF 2007

And

M.P.No.1 of 2007

Y.Rengappa

... Appellant

Vs.

1.M.Venkataswami

2.Puttamma

3.Ellappa

4.Muni Venkatappa

5.Venkatesalu

... Respondents

Second Appeal filed against the judgment and decree dated 09.01.2007 passed by the Subordinate Judge, Hosur, in A.S.No.46 of 2005, reversing the judgment and decree, dated 31.10.2005, passed by the District Munsif, Hosur, in O.S.No.111 of 2000.

For Appellant : Mr.I.Abrar Md.Abdullah

For Respondents: Mr.Arun Anbumani for R1 to R5

JUDGMENT

This Second Appeal is filed by the plaintiff as against the judgment and decree, dated, 09.01.2007, passed by the Subordinate Judge, Hosur, in A.S.No.46 of 2005, reversing the judgment and decree, dated 31.10.2005, passed by the District Munsif, in O.S.No.111 of 2000, which was one for declaration of title and permanent injunction.

2.The appellant is the plaintiff and the respondents are the defendants in the suit proceedings. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3.The appellant herein, as plaintiff, has approached the District Munsif, Hosur, by filing O.S.No.111 of 2000, seeking for declaration of title and permanent injunction in respect of the suit schedule property.

4.The respondents/defendants have resisted the claim of the appellant/plaintiff stating *inter alia* that the plaintiff was not entitled to the entire extent of suit schedule property. The plaintiff and the

defendants were close relatives and the dispute between them arose as under:

5.The plaintiff is the grandson of one Munivenkatappa. The said Munivenkatappa had three sons, viz., Venkatasamy, Kusiliyappa and Ellappa. The plaintiff is the son of Ellappa. The first defendant is Venkatasamy, the elder son of Munivenkatappa, second defendant is the wife of the first defendant/Venkatasamy, third, fourth and fifth defendants are the sons of first and second defendants. The dispute is between the grandson of Munivenkatappa, i.e. son of Ellappa, on one side and son Venkatasamy and his heirs on the other side, regarding the title to the suit schedule property.

6.The case of the plaintiff is that on 17.06.1959 a partition was effected between Munivenkatappa and his three sons and the same was registered. The Registered Partition Deed, dated 17.06.1959, was marked as Ex.A5 in the suit proceedings. As per the Partition Deed, 'A' Schedule property was retained by Munivenkatappa, 'B', 'C', and 'D' schedule properties were allotted to the first defendant Venkataswamy, Kusiliyappa @ Chinnamuniyappa and Ellappa, respectively. Thereafter, it appears that the said Munivenkatappa has

executed two Registered Gift Deeds, on 16.12.1961, in respect of his property, viz., one document bearing No.4147/61 in favour of Ellappa, who is the father of the plaintiff, gifting him 0.48 ½ cents on the Northern side and another document bearing No.4148/61 in favour of the first defendant/Venkataswamy, gifting him 43 ½ cents on the Southern side. By virtue of the gift given in favour of his father, viz., Ellappa, the plaintiff claims right over the suit schedule property to an extent of 0.48 ½ cents on the Northern side.

7.The above claim of the plaintiff was disputed and resisted by the defendants on the ground that as far as Survey No.661/1 was concerned, the gift given by Munivenkatappa in favour of the father of the plaintiff Ellappa, through gift deed, dated 16.12.1961, to an extent of 23 cents, was not valid, since from the same Survey No.661/1, 11 cents had already been sold by way of a Registered Sale Deed, wayback on 30.11.1936 by the same Menivenkatappa to one Lakshmiayya, on the file of the Sub Registrar, Hosur. Therefore, 23 cents gifted in Survey No.661/1, on 16.12.1961, was infact, not available for gift, since 11 cents had already been sold in 1936 itself. Therefore, the case of the defendants was that the plaintiff was entitled to succeed only to the extent excluding 11 cents, which was

already sold in Survey No.661/1.

8.The trial Court, which framed the issues on the basis of the pleadings and the materials, has accepted the claim of the plaintiff and decreed the suit as prayed for, vide its judgment and decree dated 31.10.2005. According to the trial Court, the two Gift Deeds, dated 16.12.1961, executed by Munivenkatappa in favour of the father of the plaintiff and also the first defendant, which were marked as Exs.A1 and A2, would establish the extent of properties allotted to the respective sons of Munivenkatappa, viz., Ellappa/father of the plaintiff and Venkataswamy/the first defendant. According to the trial Court, the reports of the Advocate Commissioner, who was appointed for the purpose of measuring the extent of property enjoyed by the plaintiff, which were marked as Court documents Exs.C1 and C2, did support the claim of the plaintiff.

9.Moreover the trial Court has come to the conclusion against the counter claim of the defendants precisely on the ground that the so called sale, which was effected on 30.11.1936 by Munivenkatappa in favour of one Lakshmiayya was not proved by the defendants, as the defendants had not taken any steps to mark any documents in support

of their resistance. In fact, the trial Court has held that in the absence of Sale Deed, dated 30.11.1936, the contention of the defendants was not to be considered as valid and acceptable and on the other hand, the trial Court concluded that the documents, viz., Exs.A1 and A2 (Gift Deeds) and Ex.A5, the Partition Deed, dated 17.06.1959, would show that the plaintiff was in possession and enjoyment of the property and therefore, decreed the suit in favour of the plaintiff.

10.As against the judgment and decree of the trial Court, dated 31.10.22005, the defendants preferred an appeal before the Sub Court, Hosur, in A.S.No.46 of 2005. On behalf of the defendants, who were appellants before the appellate Court, I.A.No.20 of 2006 was filed under Order 41 Rule 27 of the C.P.C., for letting in additional evidence. The additional evidence being Sale Deed dated 30.11.1936, bearing No.579 of 1937, on the file of the Sub-Registrar, Hosur. In pursuance of the I.A.,being filed and entertained, an oral evidence was let in to mark the Sale Deed, dated 30.11.1936 and on behalf of the plaintiff, the witness was also cross-examined. The appellate Court, after due appreciation of the materials and the pleadings, allowed the appeal in favour of the defendants and set aside the judgment and decree of the trial Court, vide its judgment dated 09.01.2007. According to the

lower appellate Court, the basis of the trial Court finding in favour of the plaintiff was that the defendants did not prove due execution of the Registered Sale Deed dated 30.11.1936. Since the defendants, who were the appellants before the lower appellate Court, had produced the documents and marked the same through their witness, the entire *lis* between the plaintiff and the defendants had to be decided on that basis.

11.In the above circumstances, the lower appellate Court has come to the conclusion that it has been clearly established through the Sale Deed, which is a registered document dated 30.11.1936, that under the Sale Deed, 11 cents had already been sold to one Lakshmiah in Survey No.661/1, by Munivenkatappa. In view of the fact of 11 cents being sold wayback in 1936, the lower appellate Court has held that the plaintiff's entitlement of title to the suit schedule property cannot include that 11 cents in Survey No.661/1. Since the marking of the Sale Deed dated 30.11.1936 had changed the entire claim and rival claim of the plaintiff and the defendants, the lower appellate Court has reversed the findings of the trial Court.

12.As against the said judgment and decree of the lower

appellate Court, the plaintiff is before this Court by way of Second Appeal.

13.While admitting the Second Appeal, the following Substantial Questions of Law were framed by this Court:

"1.Whether the lower appellate Court was right in entertaining the oral evidence which seek to vary the recitals in registered instruments, namely, Exhibits A1, A3 and A5?

2.Whether the findings of the appellate Court are rendered perverse due to the non-consideration of the vita oral evidence of D.W.1?

3.Whether the lower appellate Court was right in entertaining oral evidence before it took up I.A.No.20 of 2006, filed under Order 41 Rule 27 for consideration?"

14.I.Abrar Md.Abdullah, the learned counsel appearing for the appellant/plaintiff would submit that the lower appellate Court has failed to appreciate certain crucial evidence and also the documents Exs.A1, A2 and A5, which were in fact relied upon by the trial Court for decreeing the suit in favour of the plaintiff. The learned counsel would also submit that the defendants' evidence, particularly, the evidence of

D.W.1 itself would support the claim of the plaintiff, as he had clearly deposed that the plaintiff was given a larger share than the defendants. Unfortunately, the lower appellate Court has overlooked Exs.A1, A2 and A5 and also the evidence of D.W.1. Therefore, the learned counsel would submit that the judgment and decree of the lower appellate Court are liable to be set aside.

15.On the other hand, Mr.Arun Anbumani, the learned counsel for the respondents/defendants would submit that the trial Court's conclusion in favour of the plaintiff was principally because of non-production of the Sale Deed dated 30.11.1936. In the absence of the said document, the trial Court was entirely guided by the Gift Deeds dated 16.12.1961, which were marked as Exs.A1 and A2 and also the Partition Deed dated 17.06.1959. From the judgment of the trial Court, according to the learned counsel, it could be seen that the trial Court had to come to such conclusion in favour of the plaintiff only because of the fact that the Sale Deed dated 30.11.1936 was not produced on behalf of the defendants, though a counter claim was put up by the defendants on the basis of the said document. The entire *lis* between the plaintiff and the defendants was only with reference to 11 cents in Survey No.661/1 and that the *lis* could be settled only on the

basis of the Sale Deed dated 30.11.1936, but unfortunately the said document could not be produced before the trial Court. The learned counsel would submit that however when the appeal was pending before the lower appellate Court, the lacuna was removed by letting in additional evidence at the appellate stage and after examining the witness, the Sale Deed dated 30.11.1936 was also marked. The lower appellate Court, therefore, has relied on the said document, which clinched the issue in favour of the defendants and reversed the findings of the trial Court. Once the lower appellate Court was satisfied with the fact that 11 cents had already been sold to one Lakshmiah by Muni Venkatappa under the Sale Deed, dated 30.11.1936, the claim of the plaintiff to that 11 cents was rightly disallowed. Therefore, the learned counsel would submit that the plaintiff is not entitled to succeed in this appeal.

16.Considered the submissions of the learned counsel Mr.I.Abrar Md.Abdullah, appearing for the appellant/plaintiff and Mr.Arun Anbumani, the learned counsel appearing for the respondents/defendants and perused the materials and pleadings placed on record.

17.The entire *lis* as between the plaintiff and the defendants was only in relation to 11 cents in Survey No.661/1. The plaintiff succeeded before the trial Court, as he was able to establish through Exs.A1 and A2, viz., Gift Deeds, dated 06.12.1961 and Ex.A5, the Partition Deed dated 17.6.1951. The trial Court, at that point of time had to rely on those documents in order to render a finding in favour of the plaintiff, because the counter case put up by the defendants that 11 cents had already been sold, vide Sale Deed dated 30.11.1936 was not established at all. The plaintiff therefore succeeded on the weak resistance put up by the defendants. In fact, the trial Court had no choice except to accept the case of the plaintiff, since the most crucial document, which could decide the *lis*, viz., Sale Deed dated 30.11.1936, was not made available by the parties in the suit proceedings. From the trial Court judgment, it could be seen that the findings and the conclusion reached by the trial Court was principally due to the absence of the Sale Deed dated 30.11.1936 and non production of the said document had enured to the advantage of the plaintiff.

18.While so, the defendants, in the first appeal had filed I.A.No.20 of 2006, under Order 41 Rule 27 CPC, and the lower

appellate Court felt that the additional evidence was crucial for deciding the *lis* between the parties and accordingly allowed the defendants to lead additional evidence. Once the crucial document, viz., Registered Sale Deed, dated 30.11.1936, was produced and marked through evidence before the lower appellate Court, it was concluded by the lower appellate Court that as per the said Sale Deed, 11 cents in Survey No.661/1 had already been sold under the Sale Deed, to one Lakshmiah and therefore, to that extent, the plaintiff was not entitled to have a judgment or decree in his favour.

19.As per Order 41 Rule 27, it is open to the appellate Court to direct the parties to produce any document or any witness to enable it to pronounce its judgment. Since, the document, dated 30.11.1936, the Sale Deed, which alone would establish the factum of the 11 cents being sold to one Lakshmiah in Survey No.661/1, the lower appellate Court has allowed the I.A. and allowed the defendants to mark the said document. Once the said document was on record, the appellate Court had rightly relied on the same and reversed the findings of the trial Court.

20.The learned counsel for the respondents/defendants cited a judgment of the Hon'ble Supreme Court of India in **STATE OF RAJASTHAN VS. T.N.SAHANI AND OTHERS [2001(10) SCC 619]** regarding application of Order 41 Rule 27 CPC, wherein, the Hon'ble Supreme Court of India has held as follows:-

"4.It may be pointed out that this Court as long back as in 1963 in K.Venkataramiah v. Seetharama Reddy [AIR 1963 SC 1526] pointed out the scope of unamended provision of Order 41 Rule 27© that though there might well be cases where even though the court found that it was able to pronounce the judgment on the state of the record as it was and so, additional evidence could not be required to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. This is entirely for the court to consider at the time of hearing of the appeal on merits whether looking into the documents which are sought to be filed as additional evidence, need be looked into to pronounce its judgment in a more satisfactory manner. If that be so, It is always open to the court to look into the documents and for that purpose amended provision of Order 41 Rule 27(b) CPC can be invoked, so that the application under Order 41 Rule 27 could have been decided along with the appeal. Had the Court found the documents necessary to

pronounce the judgment in the appeal in a more satisfactory manner, it would have allowed the same, if not, the same would have been dismissed at that stage. But taking a view on the application before hearing of the appeal, in our view, would be inappropriate. Further the reason given for the dismissal of the application is untenable. The order under challenge cannot, therefore, be sustained. It is accordingly set aside. The application is restored to its file. The High Court will now consider the appeal and the application and decide the matter afresh in accordance with law."

21. In the light of the above, it is needless to say that it is always open to the lower appellate Court to examine any witness or any material in order to do substantial justice. In this case, although the defendants failed to prove their case before the trial Court, yet, they were able to produce the Sale Deed dated 30.11.1936, which supported their case fully as against the plaintiff. Once the document is produced and marked, the entire findings of the trial Court, in the absence of the said document, had to go, in the facts and circumstances of the case.

22. Therefore, this Court is of the view that the findings of the trial Court, which were rendered in the absence of the crucial

document, viz., Sale Deed dated 30.11.1936, are bound to be reversed once the above said document was made available. In that view of the matter, the judgment and decree of the lower appellate Court cannot be faulted with and the same is perfectly in order and need not be interfered with.

23.In the light of the above discussion, this Court is of the view that the Second Appeal is devoid of merits and the Substantial Questions of Law framed are answered against the appellant/plaintiff and the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is dismissed.

Msk

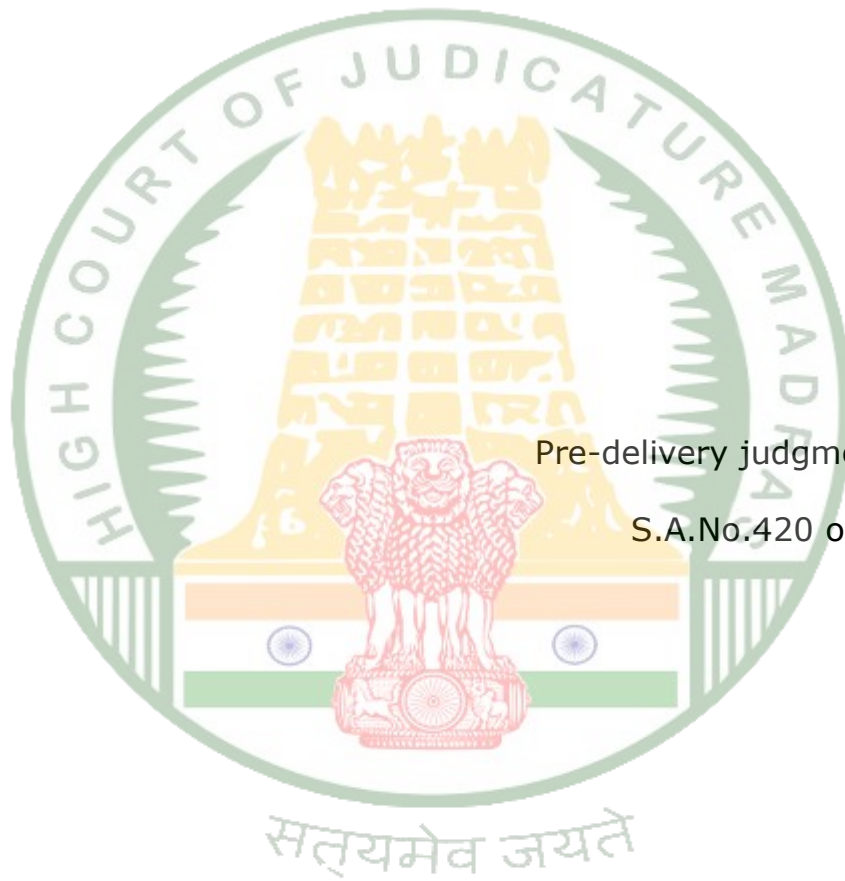
02.06.2020

To

- 1.The Subordinate Judge, Hosur.
- 2.The District Munsif, Hosur

V.PARTHIBAN,J.

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Pre-delivery judgment in
S.A.No.420 of 2007

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